Authority for each lot. According to the plaintiff therefore he should not be asked to pay the proportion that relates to the area of the land which has been reserved for roads, open spaces, electrical substations and other communal amenities.

Two other concepts would also seem to be employed in the formula for repayment in clause 2 of the agreement and these are the concept of "area" and the concept of "value". It is clear that the concept of area has been used by the parties here instead of value simply because the new lots have not yet been assessed separately by the Local Authority for otherwise plaintiff would have been liable under the agreement to pay only the actual amount assessed by the Local Authority. The concept of "value" was not employed in the formula in question but it is relevant for consideration. In my view, the construction given by the plaintiff to clause 2 of the agreement is not only inconsistent with the words in that clause but also isolates the value of his lot from the value of total area of the housing estate including such areas of the estate as have been developed for roads and other public amenities. The roads and open spaces and public and communal amenities in that area must eventually affect the value of the plaintiff's land.

For the above reasons the plaintiff's claim is dismissed with costs.

Claim dismissed.

Solicitors: *Morris Edgar & Co.; Chung & Huang.*

CREDIT CORPORATION (M) BHD. v. NATIONAL INSURANCE CO. LTD.

[O.C.J. (Chang Min Tat J.) February 28, 1975]
[Kuala Lumpur — Originating Summons No. 508 of 1973]

Arbitration — Application for order for costs — R.S.C., 1957, O.28 r.11 — Inherent jurisdiction of court.

In an arbitration under an order of court, the applicant's solicitors omitted to ask for an order for costs. The applicant then applied to the court for the order. It was contended by the respondent that the applicant was not entitled to make the application under Order 28 rule 11 and the proper course was for it to sue its solicitors for negligence.

Held: (1) the omission of the applicant's solicitors was not in a strict sense a case of clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission;

(2) there is power under the inherent jurisdiction of the court where the order has not been drawn up and entered or under the liberty to apply implied in the order or by virtue of Order 28 rule 11 of the R.S.C. to grant the order sought.

Cases referred to:-

(1) *Re Harrison's Share* [1955] Ch. 260; [1955] 1 All E.R. 185.
(2) *Fritz* v. *Hobson* (1880) 14 Ch.D. 542.
(3) *Penrice* v. *Williams* (1883) 23 Ch.D. 353.
(4) *In re Inchcape* [1942] Ch.D. 394.
(5) *Tong Lee Wah & Anor.* v. *Chin Ah Kwi & Ors.* [1971] 2 M.L.J. 75.
(6) *Cristel* v. *Cristel* [1951] 2 All E.R. 574.

ORIGINATING SUMMONS.

Miss Cheng Kah Leng for the applicant.

R. K. Nathan for the respondents.

Chang Min Tat J.: The costs of an application by Originating Summons for the appointment by the court of an arbitrator under the Arbitration Act 1952 cannot be very much and yet they constitute the subject matter of this further application before me. It became necessary only because at the hearing of the original application the applicant who was also the applicant herein obtained an order by consent but omitted to ask for an order for costs. It now asks for a further order for the costs of the application.

The facts briefly are as follows: The applicant was the hirer of a motor car which was let on hire purchase to one Chin Ah Fong. The car was insured with the respondent under a comprehensive policy of insurance which by its terms rendered the respondent liable to make good for the loss of the car even if the loss was sustained or occasioned by the hirer. The hirer reported the car stolen as far back as September 3, 1971, and a claim was lodged with the respondent. On July 20, 1973, the applicant's solicitors wrote to the respondent requiring the respondent under the terms of the insurance to nominate an arbitrator within one month of the receipt of the letter. The respondent did not reply thereto. The applicant's solicitors on October 20, 1973, wrote further to the respondent suggesting the name of Mr. Khoo Eng Chin an advocate and solicitor as an arbitrator and gave the respondent 21 days to concur or to disagree. The respondent again failed to reply. Consequent on the failure to evoke any response from the respondent, the applicant took out the originating summons on December 19, 1973, asking the court to appoint the arbitrator under section 12 of the Arbitration Act. Mr. Khoo Eng Chin was again suggested. In the originating summons the applicant failed to include a prayer for costs or the omnibus prayer for such further or other order which might have covered an omission of such a nature. When the case came up before my brother Pawan Ahmad J. a consent order was obtained for the appointment. There were consequently no arguments before the learned judge. Before that, the applicant's solicitors had written giving the respondent the usual 48 hours' notice and advising that if they were forced to apply to the court they would also apply for the costs of the application to be paid by it.

Having obtained the order the applicant noticed its omission or failure to ask for costs and immediately communicated with the respondent's solicitors to seek their agreement for such costs. The respondent failed to agree and this application is now made to the court.

From the correspondence that passed between the parties and which was exhibited in the several affidavits filed it is clear that the reason for the first application to court was the failure of the respondent to reply. The respondent also made some vague allegations of conducting investigations into the theft but the investigations did not seem to have gone very far in the course of the two years.

It ought to be borne in mind throughout that at no time was the order for the appointment of the arbitrator drawn up and perfected so that all cases on the subject of whether the court had or had not any discretion to vary an order drawn and perfected are not strictly relevant.

The main objection by Mr. R. K. Nathan to the application for costs was that this was not a case of an accidental slip or omission under O.28 r.11 of the R.S.C. so as to give jurisdiction to the court under this particular rule to correct an obvious clerical mistake or omission. It was said to be an entirely inadvertent omission which did not entitle the applicant to the order sought. It might open the applicant's solicitors to an action for damages and it was suggested strenuously that the proper action for the applicant was not to apply to court but to proceed in negligence against their solicitors.

Miss Chen for the applicant advised that she was not making any application under the said rule and that the question before the court was whether an order by the court such as this one could be varied by an additional order which was not asked for originally, particularly in the circumstance that the order had not been drawn up and perfected. She contended that under such circumstances the court has a jurisdiction that is absolute in nature. She relied on a passage from *Halsbury's* Laws of England, Third Edition, Volume 22, in paragraph 1664 at page 784. It reads as follows: —

"1664. Amendment before judgment or order drawn up. Until a judgment or order has been entered or drawn up there is inherent in every court the power to withdraw, alter or modify it, either on the application of one of the parties or on the initiative of the judge himself. In the meantime it is provisionally effective and can be treated as a subsisting order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced.

When, after a judge has given judgment based on authorities as they stood at that time, but before the order has been perfected it is authoritatively declared that the order made is outside his jurisdiction, the judge should withdraw the oral order made."

This passage refers to the case of *Re Harrison's Share*.[1] It was a case dealing with an order made by a judge which order was found to be in conflict with a decision of the House of Lords subsequently pronounced. The order was not perfected and the judge on his own motion recalled the order and revoked it. The Court of Appeal held that it was right that the order should be recalled and revoked. In the judgment of the court delivered by Jenkins L.J. at page 187 the contention contra that a judge had only a limited discretionary power of varying or discharging an order orally pronounced by him at any time before it was perfected by entry and that such power was only confined to cases of manifest error or omission, in other words to cases within the narrow ambits of O.28 r.11 of the R.S.C. was rejected in no uncertain terms. The court went on to say and I quote:—

"We think that an order pronounced by the judge can always be withdrawn or altered or modified by him until it is drawn up, passed and entered. In the meantime it is provisionally effective...."

(See also *Mallal's* Supreme Court Practice, Fourth Edition, page 352).

But I think the application could be considered on a broader basis. In the case of *Fritz* v. *Hobson*,[2] a motion for an interim injunction was adjourned to the trial of the action but no provision was made for the costs of the motion and liberty to apply was not expressly reserved. The plaintiff succeeded at the trial on the substantial question at issue with costs but his counsel omitted to ask for the costs of the adjourned motion and no express provision was made for them. There was this time liberty to apply. The judgment was drawn up, passed and entered. The taxing master refused to allow the plaintiff the costs of the adjourned motion. The plaintiff then applied to the court by motion asking that the judgment be varied or corrected by giving him the costs of the adjourned motion. It was held that either under the liberty to apply reserved by the judgment or under the liberty to apply implied in the order adjourning the motion or by virtue of the then O.41A (which is our O.28 r.11) the court had jurisdiction to order the payment of the costs in question and it made such an order.

The relevance of this case, as I see it, is in the order for an adjournment. That order was similarly not drawn up and there was also no reservation of liberty to apply. Insofar as the latter was concerned Fry J. at page 561 of the All England Report had this to say:—

"According to my understanding of the practice (and this is confirmed by what the Master of the Rolls has said), all orders of the court carry with them *in gremio* liberty to apply to the court."

This statement had been narrowed in *Penrice* v. *Williams*[3] by Chitty J. to be applicable only to cases where the order was not one of final character. In the present case the order appointing the arbitrator is not a final order and I must therefore hold, following these two decisions, that the order implies a liberty to apply.

Another case is *In re Inchcape*.[4] This case concerns an accidental omission of counsel within O.28 r.11 to ask for certain costs for obtaining evidence and advice on the question on the domicile in England and Scotland, but it is also of a certain amount of interest, in the way in which Morton J. dealt with the application.

The learned judge first recalled the case and he stated clearly that if he had been asked at the hearing to allow these costs to be taxed as between solicitor and client and paid out of the estate he would have made the order. In the instant case having regard to the facts as stated above and particularly to the fact that the application was necessary because of the failure of the respondent to abide by the arbitration clause reserved in the policy of insurance, I have not the slightest doubt that my brother Pawan Ahmad J. would have made the order for costs if he had been asked.

I accept the contention of Mr. R. K. Nathan that this is not in a strict sense a case of clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission. It was an inadvertent or accidental omission of counsel to ask for the particular order for costs. The question is, therefore, whether this is sufficient to take the case outside the scope

of O.28 r.11. Fry J. in *Fritz* v. *Hobson, supra,* did not think so. This is what he said at page 561 of the All England Report: —

"There is another ground on which, in my opinion, I have jurisdiction to make the order asked for, namely, under Order XLI.A. In my view the error in the present case has arisen from the accidental omission of counsel to call my attention to the adjourned motion when I pronounced my judgment, an omission very natural at a time when counsel's attention was directed to matters of greater importance. In substance, the motion was before me at the trial, for my attention was called to the affidavits made upon it. I recollect quite enough of what took place, and I am confirmed in my recollection by the notes which I made at the time, to know that all the affidavits upon the motion were in substance before me at the trial, and that the various witnesses who made those affidavits were examined in the course of the proceedings. On this ground, therefore, I think I have jurisdiction to make the order."

This passage was relied upon and repeated by Morton J. in *In Re Inchcape, supra.* An omission to ask for costs was in these two cases treated as within the ambit of O.28 r.11.

In the course of the arguments both sides referred to the case of *Tong Lee Wah & Anor.* v. *Chin Ah Kwi & Ors.*[5] This was a case in which I was overruled by the Federal Court upon the ground that I was wrong in implying that the liberty to apply which was reserved meant liberty to apply to vary an order that had been drawn up and perfected. Mr. R. K. Nathan drew my attention to the case of *Cristel* v. *Cristel*[6] where in the majority judgments of Somervell and Denning L.JJ. it was suggested that though the order was drawn up if the applicant could prove a change of circumstances the court must have allowed the variations sought. I trust I will be forgiven if I mention that it was precisely a change of circumstances which led me to vary the order. It would not however appear that the case of *Cristel* v. *Cristel* was ever brought to the attention of the Federal Court. Be that as it may, I am of course bound by the decision of the Federal Court but on the facts of this case the decision in *Tong Lee Wah's* case has, with respect, no relevance since it was a case dealing with an order drawn up and perfected. *Cristel's* case was also a case of an order that had been drawn up.

In the circumstances of this case and on the authorities, I conceive I have the power either under the inherent jurisdiction of the court where the order has not been drawn up and entered, or under the liberty to apply implied in the order or by virtue of O.28 r.11 of the R.S.C., to grant the order sought for in the Summons-in-Chambers together with costs of the application to be taxed by the proper officer of this court and when taxed to be paid by the respondent to the applicant.

Application granted.

Solicitors: *Skrine & Co.; R. K. Nathan & Co.*

PUBLIC PROSECUTOR v. GAN AH BEE

[A.Cr.J. (Ajaib Singh J.) March 8, 1975]
[Seremban — Criminal Appeal No. 3 of 1974]

Price Control Act 1946, s. 22(1) — Illegal entry and seizure — Admissibility of evidence.

Evidence — Illegal or unlawful search — Admissibility.

An enforcement officer under the Price Control Act entered the respondent's premises and made seizure of goods. The officer was not a person authorised under section 14 of the Act and his entry and seizure therefore were illegal. At the conclusion of the prosecution case, the court acquitted the respondent without calling on his defence. The Public Prosecutor appealed against the acquittal.

Held: evidence obtained as a result of an illegal or unlawful search did not affect its admissibility provided that the evidence was otherwise relevant.

Cases referred to:-

(1) *C. Mohammad* v. *Public Prosecutor* [1974] 1 M.L.J. 25.
(2) *Saminathan* v. *Public Prosecutor* [1937] M.L.J. 39.
(3) *Public Prosecutor* v. *Tan Keng Siew* [1955] M.L.J. 59.
(4) *Wong Liang Nguk (f)* v. *Public Prosecutor* [1953] M.L.J. 246.
(5) *Kuruma* v. *The Queen* [1955] A.C. 197 (P.C.).

CRIMINAL APPEAL.

Manjeet Singh (Deputy Public Prosecutor) for the appellant.

S. K. Lingam for the respondent.

Ajaib Singh J.: This is an appeal by the Public Prosecutor from the decision of the learned magistrate who had acquitted and discharged the respondent at the close of the prosecution case on a charge under section 22(1) of the Price Control Act, 1946, for failing to affix labels or tags on certain goods offered for sale indicating the grades and prices thereof as required under the Price Control (Indication of Grade and Prices) Order, 1967.

The brief facts of this case are that an enforcement inspector from the Ministry of Trade, Commerce and Industry made a surprise check in a shop selling sundry goods on a wholesale as well as on a retail basis. Various goods were displayed for sale in the shop and it was discovered that some goods which were required to be affixed with marks or labels with an indication of their grades and prices under the Price Control (Indication of Grade and Prices) Order, 1967, made by the Price Controller in the exercise of the powers conferred upon him under section 13(1)(d) of the Price Control Act, 1946, and gazetted as P.U. 271 of 1967 as amended by P.U.(A) 512 of 1969 and P.U.(A) 282 of 1972, were not so marked or labelled. The offending goods consisted of soap, egg mee, tea, baby gripe water, coconut oil, agar-agar and 10 brushes. Except for the brushes these goods were all contained in boxes, packets, tins and bottles. The enforcement inspector seized the goods and lodged a report. Subsequently, proceedings were instituted against the respondent who was the retailer of those goods for an offence under section 22(1) of the Price Control Act for not complying with the order made by the Price Controller.

At the end of the case for the prosecution in the lower court Mr. S. K. Lingam, learned counsel for the defence, made a submission of no case to answer. He